Supreme Court, U.S.
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No. 10-3

In the Supreme Court of the United States

Edward H. Flint

Petitioner

v.

Target Corporation

Respondent

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Court

Brief for the Respondent in Opposition

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6 the undersigned Counsel for the Respondent, Target Corporation, certifies as follows:

Target Corporation has no parent companies, nor is it owned in any part by a publicly held corporation.

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QUESTIONS PRESENTED

1. Whether Summary Judgment was erroneously granted to the Respondent.

2. Whether Kentucky statute, K.R.S. § 411.340 is constitutional.

OPINIONS BELOW

The opinion of the Court of Appeals, Petitioner's Appendix, Pages A3-A8, (hereinafter "PA, ____") is unreported. The memorandum opinion of the District Court (Respondent's Appendix 1, Pages A1-A11, (hereinafter "RA, ____") is reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 2007. The petition for rehearing en banc was denied on April 14, 2010. The petition for a writ of certiorari was filed on May 18, 2010, and placed on the docket on June 29, 2007. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

This case involves claims that the Petitioner filed against the Respondent, Target Corporation, alleging negligence and product liability in its sale of a prescription medication that was dispensed by Petitioner's local Target pharmacy. The United States District Court for the Western District of Kentucky granted summary judgment to Respondent, Target Corporation. RA, A1-A11. The United States Court of Appeals for the Sixth Circuit affirmed. PA, A3-A8. The Court of Appeals denied Petitioner's petition for a rehearing en banc. PA, A2.

Factually, this case arises, in part, out of the care and treatment Petitioner received from a non-party, Dr. David Benson, who performed prostate surgery on the Petitioner in November 2006. Following the surgery, Dr. Benson prescribed the drug, Pyridium (generic name: phenazopyridine), for the Petitioner. Pyridium is an analgesic used to relieve pain, burning and other discomfort caused by infection or irritation of the lower urinary tract. The Petitioner had the prescription filled

at the Target Pharmacy, located at 4174 Westport Road, Louisville, Kentucky. In total, Mr. Flint was dispensed three fills of Pyridium. The third fill of the medication was manufactured by a different manufacturer. With each prescription, Petitioner was provided patient education sheets, informing him of the general uses of the medication, the cautions associated with taking the medication, the side effects, and the pharmacy's and prescribing physician's information, and the name of the manufacturer. RA, A3; PA, A4.

Following the report of an alleged allergic reaction, Target pharmacist, Mr. Rob Warford, examined the prescription dispensed to Mr. Flint and confirmed that he received the correct medication, as prescribed by the Petitoner's physician, Dr. Benson. Mr. Warford also confirmed that the dosage instructions were correct in accordance with the physician prescription. There was no error in the filling of the prescription. Mr. Warford advised Mr. Flint to contact his physician, and he also referred him to Target's national customer service. He then provided Mr. Flint with the names and numbers of the manufacturers of the pills, and a list of the inactive ingredients in the pills that were dispensed in the third fill. RA, A3-A4. Mr. Flint subsequently instituted this lawsuit on October 10, 2007. PA, A5

ARGUMENT

SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT TARGET CORPORATION WAS APPROPRIATE AND THE KENTUCKY MIDDLEMAN STATUTE IS CONSTITUTIONAL

The Petitioner is seeking review by the Supreme Court of the United States on seven stated issues. They include: (1) & (2) the constitutionality of KRS § 411.340, also known as the Kentucky "middleman" statute, (3) the application of KRS § 411.340 to the dispensing of prescription drugs by a pharmacy, (4) interpretation of KRS § 411.340 as it relates to pharmacies, and (5) & (6) & (7) the Petitioner's due process rights as it relates to the District Court's ruling in favor of the Respondent, Target Corporation.

The Court of Appeals affirmed the District Court's findings that no genuine issues of material fact existed that could allow the Petitioner to establish that Respondent, as a pharmacy, breached the duty owed to him, and therefore Respondent could not be proven to be negligent. The Court of Appeals further stated that Kentucky's "middleman" statute, KRS § 411.340 applied to Respondent, Target, and shielded it from liability on Petitioner's product liability claim. The Court of Appeals' decision resulted in affirmation of the summary judgment decision in favor of Respondent, Target Corporation. And, that decision, applying the Kentucky state law on negligence and product liability as it relates to pharmacies in a negligence and product liability case, does not present a compelling reason for review by this Court. Sup. Ct. R. 10.

The United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit found that under Kentucky law, Respondent exercised the duty of care used by or-

dinary, skillful and prudent pharmacists under similar circumstances, and dispensed the correct medication to the Petitioner in accordance with the prescribing physician's instructions. RA, A1-A11; PA, A3-A8. The Court of Appeals, in its opinion stated:

> As the District Court found, all evidence presented indicates Target complied with that standard. Flint, 2009 WL 87469, at *3. Flint claims that the drugs he was given were not FDA-approved, but these statements are no more than bare allegations that do not suffice to defeat summary judgment. He also contends that Target breached it duty to him in the third fill by substituting a cheaper generic drug for another generic drug, but Target's actions are authorized by Kentucky statute. *See*, Ky.Rev.Stat.Ann. § 217.822. Flint further claims that Target had the duty to investigate and test any prescription medications it sold before dispensing them to customers, but there is no law to support this assertion. Summary judgment on Flint's negligence claim based on the element of breach was appropriate. PA, A6.

Additionally, the District Court and the Court of Appeals found that pharmacists in Kentucky are protected by the Kentucky "middleman" statute, Ky.Rev. Stat.Ann. § 411.340. PA, A6. See also, RA, A8-A9. Specifically:

> Kentucky law provides that retailers are not liable in product liability actions if: "(1) the manufacturer [is] identified and subject to the Court's jurisdiction, and (2)

> the product sold by the...retailer [was] unaltered from its original manufactured condition." Salisbury v. Purdue Pharma, L.P., 166 F.Supp.2d 546, 551 (E.D.Ky.2001). Exceptions to middleman protection exist if (1) ...the...retailer breached an express warranty, or (2) ...the ...retailer knew or should have known at the time of distribution or sale that the product was in a defective condition and unreasonably dangerous." Id. PA6.

Both the District Court and the Court of Appeals found that the two conditions were satisfied and that neither exception existed. Both courts rejected Petitioner's "unsupported allegation" that the middleman statute is unconstitutional. PA, A7.

The District Court and the Court of Appeals rejected the Petitioner's argument that it was error to not allow him to amend his Complaint to add greater detail against Respondent, finding that the added details "would not help [Petitioner] establish a genuine issue of material fact on the issues that entitle Target to summary judgment." PA, A8. Further, both courts held that the Petitioner did not properly preserve the argument regarding all pending non-dispositive motions for appeal, despite being given the opportunity to do so. PA, A8. The Court of Appeals found that:

> The District Court docket reveals that all non-dispositive motions were referred to a magistrate judge on May 20, 2008, who on September 20, 2008, ordered that "all pending non-dispositive motions are hereby administratively remanded without prejudice to the parties' right to request

> that they be returned to the court's active docket within 15 days after the entry of any order denying Target's request for summary judgment." Flint had been advised that, in order to have any of his remaining motions decided, he needed to take action before the district court, which he never did. PA, A8.

The Court of Appeals further held that Petitioner failed to appeal the magistrate's order or include any of the motions in his notice of appeal, thereby failing to preserve the issue for appeal. Finally, the Court noted in footnote number two that any further consideration of the August 28, 2008 motion to amend would be futile, as the one-year limitations period that applies to product liability and negligence claims in Kentucky had run before the motion was filed. PA, A8.

CONCLUSION

Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied due to Petitioner's failure to show any compelling reason for review by this Court.

Respectfully submitted,

/s/ Richard P. Schiller

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-00600-R
No.09-5153

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

FILED - January 13, 2009

MEMORANDUM OPINION

In this action, the plaintiff, Mr. Edward H. Flint, is suing Target Corporation *pro se*[1] because he experienced a negative physiological reaction after taking some medication dispensed by his local Target pharmacy. Mr. Flint believes that the negative reaction was directly caused by some pills dispensed by the Target pharmacy, and suspects the pills contained one or more harmful ingredients. In response, Target

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[1] *Pro se* is a Latin adjective "for self," and a short convenient phrase courts use to describe a person who represents himself in a legal proceeding without the aid of an attorney.

asserts that it correctly filled and dispensed Mr. Flint's prescription in accordance with his doctor's directions, and that there exists no evidence either that: (a) Mr. Flint's alleged reaction was caused by the pills in question, or (2) that the pills dispensed improperly contained harmful ingredients. Accordingly, Target has filed a motion for summary judgment of Mr. Flint's claims.

The Court has reviewed Target's motion, Mr. Flint's response thereto, and the evidence of record in this case. While the Court is not without sympathy to Mr. Flint's past physical discomfort, or his frustration over what he believes to be poor customer service taken to a potentially harmful extreme,[2] it observes that any recovery to be had would come from the manufacturer or distributor of the pills, not Target.

In Kentucky, there are two possible theories of recovery against pharmacists who dispense allegedly harmful medication: negligence and product liability. In this matter, there exists no genuine issue of material fact that would permit plaintiff to proceed to trial against Target on either claim. Accordingly, for the reasons stated herein, the Court will grant Target's motion for summary judgment and dismiss this action.

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[2]In making this observation, the Court does not mean to imply that it is this Court's official opinion that Target did, in fact, demonstrate poor customer service, much less that it is this Court's official opinion that Target made decisions that put the health or safety of its customers at risk. Rather, the Court is simply observing that Mr. Flint clearly, and earnestly, believes that Target did. As with much of life, there are the rare extremes of indisputable fact on one side and unfounded perception on the other, and then there is the large middle ground in between that consists of varying combinations of the two, neither of which can be dismissed without appropriate consideration and explanation when reaching a judgment.

I.

The facts about which the parties agree or, where disagreements exist, viewed in the light most favorable to Mr. Flint, are as follows. In November 2006, Mr. Flint's surgeon issued Mr. Flint a prescription of Pyridium (generic name: phenazopyridine) following surgery on Mr. Flint's prostate gland. Pyridium is an analgesic used to relieve symptoms of urinary tract discomfort. Mr. Flint took the prescription, which called for an initial supply and two refills, to his local Target pharmacy to be filled. The first supply of the drug was dispensed on November 16, 2006, in its generic form. The first refill, also in generic form, was dispensed by the same Target pharmacy on November 24, 2006. The second refill, also in generic form, but manufactured by a different company, was dispensed on December 6, 2006, again by the same Target pharmacy. Each time the prescription was dispensed, it was accompanied by a patient information sheet which listed several possible contrain dications, side effects (including headache, mild itching, and stomach cramps), and possible indicia of an allergic or negative physiological reaction (specifically blue or purple skin color, decreased urination, vomiting, yellow skin or eyes, rash, itching, swelling, dizziness, or trouble breathing).

On December 11, 2006, Mr. Flint reported to the pharmacy manager, Mr. Robert Wolford, that he had experienced what he believed to be an allergic reaction to the pills contained in the second refill—itchy hives and bumps inside his mouth, a numb tongue, and a loss of taste. Mr. Wolford examined the prescription and determined that there had been no error in the *filling* of the prescription. In other words, Mr. Wolford confirmed that the drug Pyridium had been dispensed to Mr.

Flint (albeit in its generic form, phenazopyridine) and the dosing instructions had been issued in accordance with Mr. Flint's surgeon's instructions. Mr. Wolford instructed Mr. Flint to stop taking the medication, however, and told him to call his surgeon. Mr. Wolford also gave Mr. Flint Target's national customer service number and the names of, and contact information regarding, the two companies who had manufactured the pills dispensed to Mr. Flint. Lastly, Mr. Wolford refunded Mr. Flint's money and gave Mr. Flint a list of the inactive ingredients in the pills sold by Breckinridge Pharmaceutical, the company that had manufactured the pills in the second refill, which contained the pills Mr. Flint was taking when he experienced a negative physiological reaction.

Thereafter, Mr. Flint attempted to resolve his concerns directly with Target's customer service department. The experience was not to Mr. Flint's liking. He perceived that Target's customer service agents were not being appropriately responsive to his concerns and were not being sufficiently helpful to his efforts to determine the cause of his reaction. Correctly or incorrectly, this led Mr. Flint to his now firmly-held belief that Target places greater emphasis on profit than customer health and, therefore, does not employ appropriate internal control measures sufficient to ensure that it only purchases quality pharmaceutical supplied from the manufacturers and distributors with whom it does business. He believes that there was some unidentified allergenic or otherwise harmful ingredient in the pills manufactured by Breckinridge Pharmaceutical that caused him to have an allergic reaction, not properly described as a risk on the patient information handouts provided to him when

his prescription was dispensed. Hence this lawsuit.

Because Mr. Flint is proceeding without an attorney, his causes of action are not presented in the customary fashion. That is to say, his specific legal claims are not identified and isolated from his general allegations. Rather, Mr. Flint's Complaint is presented in narrative form, as a series of complaints. This is not impermissible, or even atypical of Complaints filed *pro se*, but it nevertheless does pose some difficulty for the Court and for opposing counsel, who must attempt to liberally construe Mr. Flint's narrative and discern discrete, actionable claims amongst the general prose.

In its motion for summary judgment, Target has construed the Complaint as seeking relief under the theories of negligence and product liability. This comports with the Court's reading of the Complaint,[3] and its understanding of potential theories of recovery available to Mr. Flint under Kentucky law. Accordingly, the Court will now evaluate each cause of action, and determine whether Target's request for summary judgment should be granted or denied.

II.

It should be well known to all in the legal community by now, but because Mr. Flint is acting as his own counsel, it bears repeating that summary judgment as a matter of law is proper only where there exists no *genuine* issue of *material* fact. FED. R. CIV. P. 56(c)(emphasis added). In considering a motion

[3]Mr. Flint filed his initial Complaint in Jefferson Circuit Court on October 10, 2007, and it was removed to federal court on October 30. On June 16, 2008, after Target had moved for summary judgment, he filed a motion requesting leave to file an amended complaint. That motion has not been granted and, although it contains additional narrative, the tendered Amended Complaint does not contain additional causes of action, nor would it change this Court's substantive analysis.

for summary judgment, this court must construe the evidence and draw all reasonable inferences in favor of the non-moving party (in this case, Mr. Flint), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 91986).

The party bearing the burden of proof on a particular issue – regardless of whether he is the movant or non-movant – cannot rely on mere allegations or conclusory statements, however. *See Maki v. Laako*, 88 F.3d 361, 364 (1996). Whereas a *pro se* Complaint will be liberally construed and may be presented in narrative form, proof of a *pro se* plaintiff's allegations is a different matter. To defeat Target's motion for summary judgment, Mr. Flint must point to in the record, or proffer, actual evidence. *Id.* What's more, the evidence he proffers must fit within certain parameters. It must be "of an evidentiary quality [*i.e*, capable of being admitted at any trial of the matter] that demonstrates the existence of a genuine issue of material fact." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997)(emphasis and bracketed explanation added. To be of evidentiary quality, "[t]he proffered evidence need not be in admissible form, but its content must be admissible." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)(emphasis in original omitted)).

With that general explanation in mind, the Court will turn to Mr. Flint's claims.

A. Negligence

Mr. Flint asserts that Target was negligent in its dispensing of his second refill. To successfully prosecute a claim of negligence, a plaintiff must establish the following four elements of that claim, that the Court will describe in terms particular to Mr. Flint's allegations:

1. That Target owed Mr. Flint a duty of care,
2. That Target breached that duty,
3. That Mr. Flint suffered injury, and
4. That the injury he allegedly suffered was directly or proximately caused by Target's breach of its duty of care.

See, e.g., Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 247 (Ky. 1992). This, of course, begs the question: What is the specific duty of care owed by pharmacists to their customers? In Kentucky, the care owed is the duty of care used by ordinarily skillful and prudent pharmacists under similar circumstances – that is, to dispense the correct medication in accordance with the prescribing physician's instructions. *See Ohio County Drug Co. v. Howard*, 256 S.W. 705 (Ky. 1923)(older, but still good, common law). All of the evidence presented, even when construed in the light most favorable to Mr. Flint, indicates that Target did

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[4]The evidence proffered indicates that Dr. Kuhn, Mr. Flint's physician and expert witness, testified that he cannot be certain that phenazopyridine caused Mr. Flint's reaction. He further testified that he recommended that Mr. Flint consult with another specialists, Dr. Fowler, who might be able to isolate the cause of Mr. Flint's allergic reaction. There is no evidence that Mr. Flint ever sought Dr. Fowler's assistance, or consulted with any other specialist capable of opining with a reasonable degree of certainty about the cause of Mr. Flint's symptoms.

just that. Moreover, not even Mr. Flint disputes that Target dispensed phenazopyridine (Pyridium) pills in the correct dosage with the correct instructions for their use. Accordingly, putting aside the question of whether Mr. Flint proffered sufficient evidence that the physiological reaction he experienced was caused by the phenazopyridine pills he purchased at Target,[4] and not a reaction to a food or another type of medication he was taking, or even a reaction to another substance in his home or work environments, he cannot establish a key element of his negligence claim, namely that Target breached the duty of care it owed him when filling and re-filling his prescription. Target is therefore entitled to summary judgment of this claim.

B. Product Liability

The more complicated question is whether Mr. Flint has alleged a viable product liability claim against Target. Mr. Flint believes that the pills contained in his second refill, *i.e.* those manufactured by Breckinridge Pharamaceutical, may contain one or more inactive ingredients that are either inherently harmful or capable of causing allergic reactions such as the ones he allegedly experienced. In other words, he is asserting that Target sold him a defective product.

Generally speaking, anyone in the stream of commerce – from the manufacturer, to the distributor, to wholesaler, so the retailer – is *potentially* strictly liable for damages caused by a defective product. There are limits, however. As a matter of Kentucky statutory law, if the manufacturer of a defective product is identified and subject to the jurisdiction of the court, then the "middlemen" – namely those in the stream of commerce between the person who made the product and the ultimate consumer – such as distributors and

retailers – are not potentially liable for harm caused by the allegedly dangerous product *unless* the product was altered from its original manufactured condition or packaging, *or* the "middleman" either (a) breached an express warranty or (b) "knew or should have known at the time of distribution or sale of such product that the product was in a defective condition unreasonably dangerous to the user or consumer." *See* Ky. Rev. Stat. §411.340.

The first issue, of course is whether the manufacturer of the product has been identified. It has. Target identified Breckinridge Pharmaceutical as the manufacturer of the phenazopyridine dispensed to Mr. Flint in his second refill of his prescription, and Mr. Flint has neither disputed this in his pleadings, nor proffered evidence to the contrary. The next issue is whether Breckinridge is subject to the jurisdiction of this Court. It is, because it contracted to supply phenazopyridine to Target pharmacies in the Commonwealth. *See* Ky. Rev. Stat. 454.210; *see also Intera Corp. v. Henderson III*, 428 F.3d 605, 615 (6th Cir. 2005)(discussing the circumstances under which a company may be subject to the jurisdiction of this Court). The Court is thus left to ponder whether there is admissible evidence indicating that the pills sold to Mr. Flint had been altered from their original condition by Target, whether Mr. Flint alleged (in layman's terms) that Target breached an express warranty to him, or whether there is admissible evidence indicating Target knew the pills it supplied him were in a defective, unreasonably dangerous condition. If the Court answers "yes" to any of those three questions, Target may be liable to Mr. Flint.

With respect to the first question, this Court is not of the opinion that Kentucky courts would determine that a pharmacy's mere act of dividing and distributing drugs in doses is not sufficient to constitute an alteration of the drug's original condition or package. *See Smith v. Wyeth Inc.* 488 F. Supp, 2d 625, 629 (W.D. Ky. 2007)(Russell, J.). Something more, some active adulteration, is required. There is no allegation, much less any evidence, that Target deliberately adulterated the drugs from Breckenridge, or otherwise mis-handled them in a manner capable of causing harm to a consumer. Rather, Mr. Flint's allegation is that Target's fault stems from its decision to purchase the drugs from Breckenridge. That is a different issue altogether, and will be addressed next.

This Court finds, that, as a matter of law, Kentucky courts would agree with the majority of states which held that pharmacists are not liable for breach of either express or implied warranties with respect to the properties of particular drugs. *See id*, 488 F. Supp. 2d at 629 (internal citations omitted). Thus, even if Mr. Flint's allegations could be liberally construed to include a claim for a breach of an express warranty with respect to the properties of the medicines it dispenses,[5] that claim would fail.

As for the third and last question, there simply is no evidence that the pills supplied by Breckenridge

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[5]This is the Court's best reading of Mr. Flint's allegations. As noted previously, Mr. Flint believes that Target is not engaging in appropriate quality control in several areas ranging from its customer service, to its selection of suppliers, to its monitoring of the composition of the drugs it dispenses. One way of looking at this complaint (little "c") is that it constitutes a breach of some duty of allegations is that they state a claim for breach of warranty that any medicines sold would not contain any unidentified allergenic or otherwise harmful ingredients.

were in a defective, unreasonably dangerous condition. Rather, the evidence presented indicates that they fell within manufacturing specifications. There is no evidence to suggest that they had been altered, tampered with, or subjected to conditions that would have affected their chemical composition (*e.g.*, water, reactive chemicals), even from the testing facility to which Mr. Flint sent samples. Mr. Flint suspects that Breckenridge's generic form of Pyridium may have contained an inactive ingredient that was harmful to him in the sense that it triggered an uncomfortable, and lasting allergic reaction that has affected his quality of life. He may indeed be correct, but he has not responded to Target's request for summary judgment by providing the Court with the requisite evidence to prove that it did, however, and even if Mr. Flint could identify the putative allergen contained within the Breckenridge, that does not – without more specific proof – establish that the pills in question were defective or unreasonably dangerous. Target is therefore entitled to summary judgment in its favor with respect to Mr. Flint's second claim.

III.

In reaching its decision, the Court is mindful that, while Mr. Flint may not have a cognizable claim against Target, he nevertheless has experienced a physiological reaction that has caused him sufficient discomfort to make him initiate and vigorously maintain a lengthy lawsuit that has drained time, energy and resources. The Court is also mindful that several pending discovery motions recently were remanded pending the Court's adjudication of Target's Motion for Summary Judgment. Mr. Flint will therefore likely feel that this Court's determinations are premature,

and that he has been deprived of the opportunity to uncover sufficient evidence to make his case. None of the discovery sought in the remanded motions would have materially affected this Court's determination, however. Not all injuries are capable of redress by the courts, even if plaintiffs were permitted unlimited time and access to potential sources of proof. This is not always easy for a lay person to understand. Courts are supposed to right wrongs and they do, but only when and to the extent the law permits.

The Court will enter an order concurrently with this Memorandum Opinion that grants Target's Motion for Summary Judgment and dismisses Mr. Flint's claims.

/s/ Thomas B. Russell

Chief Judge, U.S. District Court